UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Columbus Transit LLC,

Employer,

-and -

Case No. 2-RC-23351

Transport Workers Union of Greater New York, AFL-CIO, Local 100,

Petitioner,

- and -

Local 713, International Brotherhood of Trade Unions, IUJAT,

Intervenor

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TWU LOCAL 100'S OPPOSITION TO THE EMPLOYER'S REQUEST TO VACATE THE BOARD'S DECISION AND DIRECTION OF ELECTION AND SUPPLEMENTAL DECISION AND ORDER

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PRELIMINARY STATEMENT[1]

On July 13, 2010, Columbus Transit, LLC ("Columbus" or "Employer") filed a motion requesting the Board to vacate its May 28, 2009 denials of the Employer's requests for review of the Decision and Direction of Election ("Original Decision") and Supplemental Decision and Order ("Supplemental Decision"). Transport Workers Union of Greater New York, Local 100, AFL-CIO ("Local 100" or "Petitioner") hereby files this Opposition to Employer's Request to Vacate the Board's Decision and Director of Election and Supplemental Decision and Order ("Motion to Vacate").

The majority of issues raised by the Employer's Motion to Vacate were raised in its earlier requests for review of the Regional Director's Original Decision and Supplemental Decision, which the Board denied.[2] The Employer now argues that the Board would likely have granted the Employer's requests for review if there had been three members to decide it – which is speculative at best. The Employer further argues that in order to forestall years of litigation, the Board must review the requests for review *de novo* now. With the backlog of cases facing the Board and the addition of some 96 cases challenged in the federal courts, it is unlikely that a *de novo* review of this case would happen in the near future.[3]

A hearing on Objections to the Election filed by the Employer's and Local 713, International Brotherhood of Trade Unions, IUJAT ("Local 713" or "Intervenor") in Case 2-RC-

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[1] Local 100's Opposition to the Employer's Request for Review of the Regional Director's Decision and Direction of Election dated March 4, 2009 ("Opposition") and its Opposition to the Employer's Request for Review of the Regional Director's Supplemental Decision and Order dated April 10, 2009 ("Supplemental Opposition") are incorporated herein in their entirety by reference and appended hereto.

[2] Whether an election can proceed while an 8(a)(2) charge is pending for unlawfully assisting one of two unions involved in the election; whether the election should proceed where the Region Director in the Original Decision held that one of the two unions could not be certified after the election because of the 8(a)(2) charge while the other union could be certified; whether the Board should overrule *Dana* and what is the effect of *Dana* when there is an 8(a)(2) charge alleged.

[3] Although the Board has begun addressing the cases returned to the Board by the courts, it still is not clear how many of the nearly 600 cases decided by the two-member Board can or will be contested.

23351 and on the 8(a)(5) charges filed by the Intervenor in case 2-CA-39193, originally scheduled for July 19, 2010, has been scheduled for August 24, 2010. The Objections incorporate the issues the Employer raised in its requests for review of Regional Director's Original and Supplemental Decisions, including a request to overrule *Dana Corp.*, 351 NLRB 434 (2007), and an objection that the Board did not have a quorum as required under the National Labor Relations Act. (*See* Employer's and Intervenor's objections and TWU Local 100's answers, appended hereto). Even if the Board were to overrule *Dana*, it would be applied prospectively and would have no impact on this case. 351 NLRB at 444, and fn. 11.

Based on the above, the Board should deny the Motion to Vacate and affirm its earlier decision.

STATEMENT OF FACTS

The following facts are undisputed. Columbus Transit is an Employer within the meaning of the Act, engaged in the business of providing paratransit services to New York City. Petitioner Transport Workers Union of Greater New York, AFL-CIO, Local 100 ("Local 100"), and Intervenor Local 713, International Brotherhood of Trade Unions, IUJAT ("Local 713") are labor organizations within the meaning of the Act.

On or about November 10, 2008, the Employer and Local 713 entered into a recognition agreement "whereby they agreed that Intervenor represented a majority of . . . and the Employer recognized it as the exclusive bargaining representative of its drivers." Original Decision, at 3. The Employer so notified the Region, which sent an official NLRB notice to the Employer, and the 45 day posting period began on November 17, 2008. On December 22, 2008, Local 100

> . . .timely filed the instant petition and an unfair labor practice charge in Case No. 2-CA-39089, alleging in relevant part that the Employer unlawfully recognized Intervenor as the exclusive collective bargaining representative of its drivers at a time when it did not

represent an uncoerced majority and before the Employer hired a representative complement of employees.

Id.

On February 5, 2009, the Regional Director issued her Original Decision in this matter. On February 18, 2009, the Region notified the parties that the election would be conducted on Friday, March 6, 2009, at the employer's facility in Mount Vernon, New York. On February 26, 2009, the Employer filed its original Request for Review of the Decision and Direction of Election ("Original Request") and on March 4, 2009, Local 100 filed its Opposition to Employer's Request for Review of the Original Request ("Opposition').[4] Following the Original Request, the Regional Director ordered that the election be held as scheduled on March 6, 2009, but ordered that the ballots be impounded pending a decision by the Board on the Request. The election was held as scheduled on March 6, 2009 and the ballots were impounded.

When the Board had not issued a decision on the Original Request by March 12, 2009, Local 100, in order to assure a prompt determination of the employees' wishes concerning representation, requested withdrawal of its unfair labor practice charges, including its allegations that the Employer violated § 8(a)(2) by prematurely recognizing and improperly assisting Local 713. This request was approved by the Region on March 16, 2009.

On March 20, 2009 the Region issued a Supplemental Decision and Order ("Supplemental Decision") noting, *inter alia*, that

- the "withdrawal of the Section 8(a)(2) charge removes any of the questions raised by the petition in the context of a potential taint from conduct unlawful under Section 8(a)(2) of the Act;" that
- "the discussion regarding the need for certification to be held in abeyance pending completion of the unfair labor practice proceeding should Intervenor win the election, is now moot;" and that

[4] Local 713 filed neither a timely Request for Review nor a Supplemental Request for Review.

- "the facts and circumstances now did not exist at the time of the issuance of the decision;"

and therefore deciding that

- " the order that only a conditional certification would issue in the event the employees were to vote for the Intervenor is hereby withdrawn;"

and ordering that

- "the ballots be opened at an appropriate time and counted and that thereafter the appropriate certification shall be issued." Supplemental Decision at 2-3.

On April 2, 2009, the Employer filed its Request for Review of the Regional Director's Supplemental Decision. On April 10, 2009, Local 100 filed its Opposition to the Employer's Request for Review of the Supplemental Request ("Supplemental Opposition").

On May 28, 2009, the Board issued its Order denying the Employer's requests for review of the Original Decision and Supplemental Decision without prejudice to a party's right to file objections concerning the issues raised on review.

On June 2, 2009, the Region informed the parties that pursuant to the Board's Order, the ballots would be opened and counted on June 5, 2009. The tally of ballots showed that of 50 ballots cast, 25 votes were cast for Local 100, 5 votes were cast for Local 713, 9 votes were cast for no union, and there were 12 challenged ballots, sufficient to affect the results of the election.

On June 4, 2009, the Intervenor objected to the opening and counting of the ballots based on the Section 8(a)(5) charges it had filed earlier. This was the first time that Local 100 was informed of the charges. Apparently, the Intervenor had filed unfair labor practice charges with the Region on March 10, 2009, alleging that the Employer had refused to bargain in good faith in violation of Section 8(a)(1) and (5). The charges were served on the Employer on March 16, 2009; but not on Local 100. On May 29, 2009, the Acting Regional Director issued a complaint in Case 2-CA-39193 alleging that the Intervenor had by letter dated February 24, 2009, requested

the Employer to bargain and that on or about March 4, 2009, the Employer informed the Intervenor by letter that it was refusing to bargain with the Intervenor. Shortly after the election, the Employer offered to meet with the Intervenor.

On July 10, 2009, the Regional Director issued an Order Approving Stipulation on Challenges and Revised Tally of Ballots. The revised tally of ballots showed of 52 eligible voters, 24 votes were cast for the Petitioner, 5 votes were case for the Intervenor, 9 votes were case for no union, with 9 challenged ballots. The challenges were no sufficient in number to affect the results of the election. The Regional Director, therefore, found that a majority of valid votes has been case for the Petitioner. Based on the revised tally of ballots, the Petitioner requested permission to withdraw its objections; the Regional Director granted the Petitioner's request.

ARGUMENT

I. The Board Should Deny the Employer's Renewed Request to Grant the Employer's Requests for Review

Board's Order denied the Employer's requests for review of the Original Decision and Supplemental Decision without prejudice to a party's right to file objections concerning the issues raised on review. The Employer and Local 713 have filed objections and a hearing is scheduled for August 24, 2010. Moreover, the Board's decision was grounded in current Board precedent. Even if the Board were to overrule *Dana*, it would be applied prospectively and would have no impact on this case. 351 NLRB at 444, and fn. 11.

II. The Regional Director's Determination that Local 100 Could be Certified While Local 713's Would Held in Abeyance Was Correct

Contrary to the Employer's arguments, the Regional Director correctly stated the law in her Original Decision. Original Decision, at 5. This aspect of the Original Decision simply meant

was that if Local 713 won the election, it would be certified in the event the Employer did not unlawfully assist and enter into a premature minority recognition agreement with it. This straightforward approach, a simple and correct statement of the law, would not have unfairly impacted Local 713's support, it would have facilitated employee free choice. This aspect of the decision did not prejudice Local 713 in any way, and the Employer cannot be heard to argue that a correct statement of the law somehow prejudices another party, especially one which did not itself file a Request for Review. Original Opposition, at 8-10.[5]

In its Original Request and its Motion to Vacate, the Employer conceded that the Original Decision "may have resolved the Employer's problems regarding bargaining with Local 713 while the 8(a)(2) charge was pending," but went on to argue on behalf of Local 713 that the Region's determination to meet the Employer's concerns means ". . . that employees who may have supported Local 713 would have been less likely to vote for Local 713 and more likely to vote for Local 100 . . ." Original Request, at 12-13; Motion to Vacate, at 16-17. The Employer and Local 713 have raised this issue in their objections, which is the appropriate forum to determine the impact if any of the Regional Director's Original Decision.

[5] In its Motion to Vacate and its Supplemental Request, the Employer asserts that the Regional Director determined that one union could be certified while the other union could not. Motion at 17-18; Supplemental Request, at 7. Contrary to the Employer's mischaracterization, neither the original nor the Supplemental Decision stated or implied that, "one union can be certified while another cannot," Supplemental Request, at 7. The distinction passionately urged by the Employer between holding certification in abeyance pending resolution of 8(a)(2) charges and conditional certification pending resolution of 8(a)(2) charges is ultimately one without a difference. The discussion in the Supplemental Decision of the way this issue was addressed in the Original Decision states both that "certification . . . was conditioned on the status of the Intervenor after a determination was made in the unfair labor practice charge," and ". . .certification [was] to be held in abeyance pending completion of the unfair labor practice proceeding." Supplemental Decision, at 2. It is clear that the Acting Regional Director correctly intended these phrases to be synonymous in meaning and effect.

Moreover, as argued below, the withdrawal of the 8(a)(2) charge mooted even this weak argument.

III. An Election May Proceed Where an 8(a)(2) Charge is Pending

The Employer's argument that an election may not proceed while an 8(a)(2) charge is pending is a misreading of both *Dana* and *Carlson Furniture Industries*, 157 NLRB 851 (1966). As the Employer conceded in its Original Request, under *Dana*, its recognition of Local 713 does not create a bar to processing the election petition in this case:

> The Board . . . held that if another union files a petition within forty-five (45) days, the union's petition will be processed because the recognition will not be found to be a bar to an election. Original Request, at 7.

The existence of potential recognition or contract bars was precisely the reason the Board obtained waivers of 8(a)(2) enforcement prior to processing petitions in *Carlson Furniture Industries*, *supra*, and the cases that followed it.

Thus, contrary to the Employer, in the pre-*Dana Carlson Furniture* line of cases the Board's rationale for completing the processing of 8(a)(2) allegations before holding an election unless it received a waiver from the Petitioner was that if the Employer did not violate 8(a)(2), a contract or other bar would prevent an election. *See, e.g.*, *Mistletoe Express Service*, 268 NLRB 1245, 1247 (1984) ("[t]he existing contract between the Employer and the Intervenor may constitute a bar to the representation case proceeding unless the Employer and the Intervenor have engaged in conduct violative of Section 8(a)(1) and (2) and Section 8(b)(1)(A) of the Act"); *Town & Country*, 194 NLRB 1135, 1136 (1972) (". . . the contract between the Employer and the Intervenor constitutes a bar to this proceeding unless the Employer's recognition of the Intervenor . . . was itself . . . in violation of Section 8(a)(2) . . ."); *Carlson Furniture Industries*, 157 NLRB 851, 853 (1966). In fact, in *Town & Country*, *supra*, the Board specifically found

that, in "each" of the "cases in which the Board has conducted an election despite the pendency of charges which normally 'block' such an action . . . the contract was removed as a bar." 194 NLRB at 1135. Thus, in each of the *Carlson Furniture* line of cases, it was the existence of a potential contract or recognition bar which prevented the Board from processing a petition unless the petitioning union waived enforcement of 8(a)(2). Here, there is no recognition bar, as the Employer concedes, so no waiver is necessary.

The Employer simply misapprehends the rationale for the *Carlson* decision. There, "the Employer and the Intervenor contend[ed] that their . . .collective bargaining agreement constitutes a bar to the instant petition. . .," 157 NLRB at 852, but the Board found that "an agreement entered into in violation of section 8(a)(2) of the Act is not a bar to a petition." *Id.* However, the Employer had "informed the Board that it [did] not intend to comply with the Board's order" that the Board had issued upon finding that the Employer had violated 8(a)(2). *Id.* at 853. Thus, the reason a waiver was sought and obtained in that case was that there was still a chance that the Court of Appeals could overturn the 8(a)(2) determination, which would have reinstated the contract bar to an election. Under those circumstances, the Board was understandably reluctant to process the petition. *Id.* So the petitioning Union in *Carlson*, in order to proceed promptly to an election without having to wait for the Court of Appeals to rule on the 8(a)(2) issue to learn whether or not a contract bar existed, agreed that if the Intervenor won the election and was certified, no further action would be taken to enforce the Board's 8(a)(2) findings. *Id.* Thus, the purpose of the waiver was to obviate the need for a final determination whether the 8(a)(2) conduct lifted the contract bar before proceeding to an election.[6]

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[6] Indeed, the Board found that "the Employer's violation of Section 8(a)(2) is related at least in part to the unresolved question concerning representation" because as long as there was still a possibility that the Court of

In short, *Dana*'s removal of the recognition and contract bars to an election in this matter also removes the rationale for a *Carlson*-type waiver.[7] As the Regional Director points out in the DDE, this reading of the cases is consistent with the view stated in the Casehandling Manual that the blocking charge policy is not a *per se* rule; rather, "it is premised solely on the Agency's intention to protect the free choice of employees in the election process." NLRB Casehandling Manual § 11730.

IV. The Supplemental D&O Mooted the Issues Raised in the Employer's Original Request

The Employer apparently agrees that the withdrawal of the 8(a)(2) mooted several important issues, as found by the Acting Regional Director in the Supplemental D&O. Motion to Vacate, at 20-21. The Employer asserts that the withdrawal of the charges does not moot the following: 1) the Employer's request that the Board review and overturn its decision in *Dana*; 2) the rationale underlying the Regional Director's decision not to require Local 100 to execute a *Carlson* waiver prior to proceeding to an election; and 3) the Regional Director's conclusion that *Dana* negated the necessity of a waiver, as the Employer could not raise its recognition as a bar based upon *Dana*. Motion to Vacate, at 20. All of these issues have been discussed above and are the subject of the objections scheduled for hearing on August 24, 2010, as well.

The Employer lists as an additional issue its misstatement that the Regional Director directed an election in which one union (Local 100) could have been certified after the election

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Appeals could overturn the 8(a)(2) finding, there was still a possibility that a contract bar to an election could be raised. *Id.* at 853. Thus, contrary to the Employer, the existence of a recognition or contract bar is the sense in which an 8(a)(2) charge affects the issue of representation in *Carlson* and related cases.

[7] No basis can be found in any of the cases for the Employer's circular argument that "the predicate for requiring a waiver is whether the petitioning union seeks to proceed with the 8(a)(2) charge." This is simply a restatement of the Employer's wish to be able to deny employees their right to an election simply by entering into an 8(a)(2) agreement. As analysis of *Carlson* and its progeny makes clear, where there is no recognition or contract bar, there is no basis for an Employer to extract the effective withdrawal of an 8(a)(2) charge as the *quid pro quo* for employee exercise of rights already extended by *Dana*.

while another (Local 713) could not, at least until the resolution of an 8(a)(2) charge. Motion to Vacate, at 20. In fact, the Original Decision stated only that "certification will be held in abeyance" pending determination of the 8(a)(2) charges if Local 713 wins the election (Original Decision, at 5), and the Supplemental Decision specifically withdraws the order that only a conditional certification would issue in the event the employees were to vote for the Intervenor. Supplemental Decision, at 2. Thus, the only substantive argument in the Employer's Motion to Vacate is moot. Further, its argument that the Original Decision provided a strong disincentive for employees to vote for Local 713 also is the subject of objections, scheduled for hearing on August 24, 2010.[8]

V. The Acting Regional Director Acted Well Within His Broad Authority in Issuing the Supplemental Decision.

The Employer argues that the Board should review and reverse the Supplemental Decision. Motion to Vacate, at 18. Local 100's withdrawal of the 8(a)(2) charges presented a major change in the circumstances of the case, and the Regional Director's Supplemental Decision was correctly issued in light of that change, in an effort to ensure that employees would have their ballots counted without undue delay and to avoid denying them the statutory right to a free choice of their bargaining representative. Supplemental Decision, at 2. Even the Employer concedes that "the withdrawal of the 8(a)(2) charge by Local 100 is a new event." Supplemental Request, at 5.

The Board's rules and case law both make it abundantly clear that Regional Directors possess broad authority to make determinations and dispositions in Representation cases at *any point* in the proceeding, including the authority to reconsider their decisions. *See, e.g., Pentagon*

[8] Local 100 remains extremely dubious that, if Local 713 will be able to produce evidence that *any* unit employees both knew about the decision to hold certification in abeyance and did not vote for it this reason, let alone a number of employees sufficient to impact the outcome of the election.

Plaza, 143 NLRB 1280 (1963)(Board has delegated to Regional Directors the same authority as it possesses regarding the cases they decide, including the authority to reconsider decisions); *Air La Carte Florida, Inc.*, 212 NLRB 764, 765 n. 5 (1974) ("Regional Director has full authority to reconsider his decision based upon evaluation of new evidence"). Under Rule 102.67(a), which governs "action by the Regional Director," the Regional Director may, "*either* forthwith upon the record *or* after oral argument, the submission of briefs, or further hearing, *as he may deem proper*, . . . determine whether a question concerning representation exists, . . .direct an election, . . . *or make other disposition of the matter*." (Emphasis supplied.) The Employer misinterprets 102.65(e) as implicitly limiting authority which 102.67(a), the rule directly bearing on the authority of the Regional Director to act, provides explicitly. Moreover, the very section of the Case Handling Manual specifically cited by the Employer provides,

> The filing of a request for review *shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the Regional Director*, including the direction or conduct of an election, except that the Regional Director, in the absence of a waiver, may not open and count any ballots that may be challenged until the Board has ruled on any request for review that may be filed.

R Case Handling Manual § 11274 (emphasis supplied).

CONCLUSION

For all the foregoing reasons, Petitioner Local 100 respectfully requests that the Board immediately deny the Employer's Motion to Vacate and affirm its earlier decision.

Dated: New York, New York
August 9, 2010

Respectfully Submitted,

/s/ Polly J. Halfkenny.

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CERTIFICATION OF SERVICE

A copy of Local 100's Opposition to the Employer's Request to Vacate the Board's Decision and Direction of Election and Supplemental Decision and Order has been electronically served today to counsel for all other parties as follows:

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Dated: New York, New York
August 9, 2010

/s/ Polly J. Halfkenny.
Polly J. Halfkenny.